No. 11005

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF TUCSON, a Municipal Corporation,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation,

Appellee.

APPELLEE'S BRIEF.

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CITY OF TUCSON, a Municipal Corporation,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Jurisdiction in this case rests upon diversity of citizenship of the parties and the amount of the matter in controversy, being a removed action from the Superior Court of the state of Arizona, in and for the county of Pima. [T. R. 2-32], 28 U. S. C., Sections 41, 71 and 72.

The appellant, plaintiff below, is a municipal corporation organized and existing under its charter and the constitution and laws of the state of Arizona. It is situate wholly within Pima County and is a citizen of Arizona. The appellee, defendant below, is a corporation organized under the laws of the state of Colorado and is a citizen and resident of that state. [T. R. 2 (par. 1 of the complaint); 24-27, Petition for Removal.]

The complaint was filed in the said Superior Court January 12, 1944, and summons was served upon appellee January 17, 1944.

Within the time to answer, appellee served upon appellant, and filed, Notice of Petition to Remove, Petition to Remove and Bond for Removal, and on January 31, 1944, the cause was ordered removed from the said Superior Court to the United States District Court. [Tr. 22-30.]

February 2, 1944, a Transcript of Record in said cause was filed in said United States District Court. [T. R. 31 and Supp. T. R. .....]

Thereafter proceedings were had as set forth in Appellant's Statement of Jurisdiction, the appeal herein being taken from the judgment dismissing the cause on the ground that the complaint fails to state a claim upon which relief can be granted.

Statement of the Case.

This action is one in condemnation and was filed by appellant in the Superior Court of Pima County, Arizona. Appellant seeks to take all the property of appellee which is devoted to public service for the purpose of supplying electric light, power, natural and artificial gas to the City of Tucson, its inhabitants, as well as to consumers located outside the City within the State of Arizona, within the area in which appellee is now operating.

Briefly the complaint [Tr. 1-20] alleges the municipal character of appellant, that it is situate in Pima County, Arizona, that appellee is a Colorado corporation transacting business within Pima County and the state of Arizona.

That appellee is distributing electricity and gas to appellant, its inhabitants, and consumers located outside the City.

That appellee is the owner of property located within the City as well as property located outside the City, in Pima, Pinal, Santa Cruz and Cochise Counties, Arizona, and all devoted to a public use.

The complaint describes every kind and character of property and interest therein, situated in these four counties, [T. R. 3-16.] That by virtue of the Charter of appellant, and the laws of Arizona, and particularly by Sections 27-901 and 27-906 A. C. A. 1939, appellant is authorized to condemn property of the character of that of appellee.

That the property sought to be condemned is to be used by appellant in supplying electricity and gas to the City of Tucson, its inhabitants, and consumers located outside the City of Tucson, within the state.

That the taking of the said property is for public use and such taking is necessary for the operation and maintenance of a municipally owned electric utility, and for supplying electricity and gas to the City and others within the state.

That the property is now devoted to a public use and that the public use to which appellant will apply the property is a more necessary public use.

That appellant purposes to finance the acquisition of the said property under the provisions of the Municipal Revenue Bond Act of 1943, Chapter 31, Laws of 1943.

That the Mayor and Council of appellant have duly passed and adopted a resolution declaring the said property is necessary to appellant for the uses above specified

and authorizing and directing the City Attorney to institute an action to condemn said property and declare title thereto.

A motion to dismiss the complaint on the ground that it failed to state a claim against appellee upon which relief could be granted was filed, and the action was removed to the Federal Court on the grounds set forth in Appellee's Statement of Jurisdiction, and thereafter the said motion was amended and additional grounds or points filed in support of the motion.

The motion to dismiss was granted by the District Court and no amendment being made to the complaint within the time provided, final judgment was entered dismissing the action.

Under three specifications of error appellant contends; First, that under the constitution and laws of the state and provisions of the City Charter, appellant is empowered to condemn the property described in the complaint for the purpose of operating and maintaining a municipally owned utility;

Second, that the complaint sufficiently sets forth the allegations required by the constitution and laws of the state to be contained in a complaint for condemnation of property.

Third, that the complaint is invulnerable against a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12 (b) of the Rules of Civil Procedure for the United States District Courts.

Two propositions of law are set forth in appellant's Brief, the first being based on specification of error No. 1, is to the effect that appellant has the right, power, and authority to acquire by condemnation the property of appellee. The second is based upon specifications of error Nos. 2 and 3, and is to the effect that the complaint contains sufficient allegations upon which the right of appellant to condemn the property can be adjudged, and that the complaint is invulnerable against a motion to dismiss under the above cited Rule 12, (b).

SUMMARY OF ARGUMENT.

Replying to Appellant's Proposition of Law I.

(a) Appellant Had No Authority to Institute an Action Against Appellee to Condemn Its Property.

Appellant's Charter, Par. 25 of Chapter 4 provides that no public utility shall be purchased, leased, or acquired by appellant without the assent of a majority of the taxpayers, who must be qualified electors of the City voting on the question at a general or special election at which such question may be submitted. No such election at the time of filing the complaint had been held granting this authority.

The complaint states that appellant proposes to finance the acquisition of the property pursuant to the provisions of the Arizona Municipal Revenue Bond Act of 1943. At the time of filing the action, no election under this law authorizing the acquisition of, and payment for, this property had been held.

(b) Court Had Jurisdiction Only of Pima County Property.

The court had jurisdiction only of appellant's property situate in Pima County, Arizona. An action seeking to take property by condemnation must be filed under the Arizona Eminent Domain Law in each county where the property is situated. The action was filed only in Pima County and, therefore, the court was powerless to find the value of the whole utility property or even that part in Pima County in relation to the values or parts of the property situated in the other three counties, Pinal, Santa Cruz and Cochise.

(c) Appellant Could Not Acquire Utility Property Located Outside City of Tucson.

The complaint shows that all of appellee's utility property sought to be taken is devoted to public use and the taking of that property outside the corporate limits of appellant, as held in *City of Phoenix v. Kasun,* 34 Ariz. 470, 97 Pac. (2d) 210, would constitute the taking of property in public use for private use, in violation of Sec. 27-907 of the Arizona Code, Annotated, 1939.

A municipal corporation in Arizona is not a public service corporation. Any utility operation by it without its limits is the operation of private service, without liability to serve, and with no right in the outside consumer to demand service in the absence of a contract with the municipality permitting such service. The court cannot render judgment permitting appellant to take any property devoted to public service and reduce it to private service.

Jurisdictional and Constitutional Questions Involved.

(a) No Adequate Method is Provided by Law for Valuation of Utility Property.

All proceedings for condemnation must be brought in the Superior Court of the county in which the property is situated as required by Section 27-909 of the Arizona Code. If carried to a conclusion, the condemnation of appellee's property would result in four different judgments as to four different parts of the operating property, without reference to their value as a whole.

(b) Valuation as of Date of Summons is Unconstitutional.

The taking of appellee's property at a value fixed as of the date of summons in the action would be in violation of Section 17 of Article 2 of the Arizona Constitution, in that appellee would be deprived of compensation for extensions or additions made to its property to render service required of it by law during period of litigation.

(c) Proposed Taking Violates Due Process Provisions of Both State and Federal Constitutions.

In addition to Eminent Domain Law failing to provide for just compensation, and the lack of provision for evaluating a unified operating public utility situate in more than one county, the owner of property taken by condemnation is forced, if he cannot obtain the value of the property fixed by judgment by levy or execution, to forego any further relief by annulment of the proceedings by the court. Section 27-918 of the Arizona Code, Annotated, 1939, so providing.

Replying to Appellant's Proposition of Law II.

(a) State Procedure Was Followed by Appellee.

The complaint was properly tested by motion to dismiss under the rule of Arizona procedure, Section 21-429, 1939 Code, which provides therefor. This motion under the state procedure, as in the Federal procedure, supersedes the general demurrer.

(b) Complaint Fails to State the Right to Condemn.

The complaint fails to comply with the requirements of Section 27-910 of the Arizona Code in that it fails to allege that appellant had taken the required steps under its Charter and the laws of the state precedent to the filing of the action, and further attempted to condemn property not subject to condemnation.

(c) Complaint Fails to Show Certainty of Compensation.

The payment for appellee's property sought to be taken by appellant has not been provided for in that the liability to compensate, as shown by the complaint, would not be a general obligation of appellant, and no other legal arrangement to provide compensation is alleged.

(d) Appellant May Not Condemn Utility Property Serving in Another Municipality.

The law does not provide for appellant to acquire that part of a utility property serving another municipality, as such acquisition would constitute an invasion of the jurisdiction of the other municipality, over its streets and alleys, and franchises.

ARGUMENT.

We shall proceed to argue appellant's Propositions of Law in the order set forth in its brief.

Replying to Appellant's Proposition of Law I.

Appellant Had No Authority to Institute an Action Against Appellee to Condemn Its Property.

Proposition No. 1 is to the effect that appellant has the right, power, and authority to acquire by condemnation the property of appellee as described in the complaint and involves specification of error No. 1 to the effect that under the constitution and laws of the state and the provisions of the City Charter, the power and authority to condemn the said property is given.

Section 16-602 to 16-605 inclusive of the Arizona Code Annotated 1939, are cited as expressly giving to municipal corporations, the authority to exercise the right of Eminent Domain to condemn utility properties, but it will be noted that Section 16-603 of the sections cited, and hereinafter set forth in the Appendix of this Brief, requires such acquisition of any public utility to be authorized by the affirmative vote of the qualified taxpayer-electors of the municipality before the municipality may proceed to acquire such property.

Sections 16-2601 and 16-2619 inclusive, of the same code, which is found in the June 1943 Cumulative Pocket Supplement, Volume 1, are also cited in support of appellant's contention, but it is to be noted that these sections which constitute the Arizona Municipal Revenue Bond Act of 1943, under which it is expressly stated in the complaint appellant is proceeding provide (sections 16-2603 to 16-2607 inclusive) for an election to authorize

the payment for such purchase or acquisition by the issuance of Revenue Bonds.

Appellant further cites Sections 27-901 and 27-906 to 27-916 inclusive, of the Arizona Code Annotated 1939. These sections constitute the major portion of the Arizona Eminent Domain Act, which do not confer the right upon a municipality to condemn property in its proprietary functions.

In addition to these statutory provisions, appellant cites certain portions of Chapter 4, Section 1, of the Charter of the City as conferring upon appellant the authority to condemn utility property under the Eminent Domain statutes of Arizona. These are sub-sections 4, 7, 22, 24 and 29 and do set forth the power of the City to condemn property for public use, however, in addition to these sub-sections cited by appellant, Section 25 of the said Chapter 4, p. 10, limits the exercise of these powers by providing: "that no public utility shall be purchased, leased, acquired, sold or in any manner disposed of, without the assent of a majority of the taxpayers, who must be qualified electors of the City, voting on the question at a general or special election at which such question may be submitted."

At the time of the filing of appellant's complaint in the Superior Court of Pima County, and the issuance of the Summons in the action, January 12, 1944, no election whatsoever had been held resulting in an authorization to the appellant to acquire by purchase or condemnation the utility property of appellee. Such an election was

jurisdictional and appellant had no authority to proceed in an attempt to condemn the property in the absence of authority by the taxpayer-electors of the municipality.

The Charter provision is as clearly binding upon the municipality as a state statute or a constitutional provision, for the Charter itself is the Constitution of the City and its provisions must be strictly followed in an attempt by the appellant to exercise the right of Eminent Domain to condemn utility property. It is said in *Town of Tremonton v. Johnson,* 49 Utah, 307, 164 Pac. 190, (reading page 191 syllabus 2):

> "The general rule is that, where the statute prescribes the procedure or steps to be taken by a municipal corporation in exercising the right of Eminent Domain, the procedure prescribed by the statute becomes a matter of substance and must be strictly followed by the condemner as against the owner of the property sought to be condemned. It is further held that, where the statute prescribes certain steps to be taken before initiating condemnation proceedings, such steps are jurisdictional, and may not be disregarded."

The Utah Court cites *Vreeland v. Jersey City,* 54 N. J. Law, 49, 22 Atl. 1052 as follows:

> "Statutes conferring the power of condemnation under the right of Eminent Domain are strictly construed. Every condition prescribed by the Legislature in the grant must be complied with, and the proceedings to condemn must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant, which the courts cannot disregard on a conception that they are not essential."

In 2 *Lewis,* Eminent Domain, Par. 596, cited by the Court the rule is stated:

> "When the taking is by a municipal corporation, it usually must be authorized by a vote of the governing body, and this must be passed in such manner and by such formalities as are required by law. No general rule can be laid down, except that the statute must be strictly complied with."

It must be kept in mind that appellants complaint to condemn appellee's property was filed and the summons was issued in the action January 12, 1944. There appears in Appellant's Brief on page 5 under, Supplement of Statement of the Case, certain information for the use of this Court, not contained in the complaint in question, nor before the lower court, nor any part of the record in this case, that subsequent to the initiation of the appellant's action to condemn, that is, on February 28, 1944, a majority of the taxpayers of the municipality voted in favor of appellant acquiring the utility property of appellee described in the complaint and that on the same day, the Mayor and Council of appellant adopted a resolution ratifying the resolution referred to in paragraph 10 of appellant's complaint, and ratified and confirmed all acts, performed by the City Attorney and other officers and agents of appellant in pursuance thereof. In the Appendix of Appellant's Brief is contained extracts of the minutes of a meeting of the Mayor and Council, and the resolution ratifying resolution 1956 of the Mayor and Council adopted one month and fifteen days after the filing.

While counsel for Appellee do not understand how this Appendix becomes part of the record in this case, it appears nevertheless. Its purpose is to relate authority back to the date of the filing of appellant's suit and provide *nunc pro tunc* for the initiation of the action.

Appellee's conception of the law is that the right to sue must exist at the time of filing of the suit. Under either the appellant's Charter or the laws of Arizona, an election is a prerequisite to the condemnation of utility property by appellant, and whether it be that public notice be given of the municipality's intended taking, or the adoption of a proper ordinance for that purpose, or the holding of an election to authorize the municipality to condemn, such primary steps must be taken prior to the filing of a condemnation action, as a matter of jurisdiction. Such steps taken after the initiation of the suit cannot relate back to, nor breathe life into, the premature attempt to take private property for public use.

The case of *Suburban Investment Company v. City of Atlanta, et al,* 148 Georgia 593, 97 S. E. 542, is one where the City Charter of Atlanta provided for the exercise of the city of the power of Eminent Domain. In the Georgia case an ordinance was required before the right could be exercised. The City of Atlanta attempted to proceed under its Charter to condemn private property for sewer purposes before an ordinance was passed for that purpose, and the Suburban Investment Company petitioned to enjoin the City from proceeding. The lower court refused to grant an interlocutory injunction and from the judgment refusing the injunction the Investment

Company appealed. The Supreme Court of Georgia, in passing upon the case, said:

> "The question presented for decision is whether the city of Atlanta can proceed under its charter to condemn private property for sewer purposes before an ordinance is passed for that purpose. In the instant case, the ordinance was passed after the offer to buy the right of way from the owner was made, and the notice required was given. This cannot be done so as to make such an ordinance effective. The ordinance must be first passed, and it cannot be subsequently enacted and made to relate back to the beginning of the proceedings to negotiate for the purchase of the right of way. Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. (N. S.) 909 (5, 6)."

The case of *Paris Mountain Water Co., v. City of Greenville,* 105 S. C. 180, 89 S. E. 669, involves an injunction proceeding brought by the water company against the city to enjoin the latter from proceeding to condemn the water company's property. The Constitution of South Carolina authorized cities and towns to construct or purchase water works upon a majority vote in favor thereof, and provided that:

> "No such construction or purchase shall be made except upon a majority vote of the electors in said cities and towns who are qualified to vote on the bonded indebtedness of said cities and towns."

The Court said:

> "There has been no election. The right to purchase is based upon a vote and if 'purchase' means 'condemn', then there can be no condemnation, ex-

> cept upon a vote. It is said the voter wants to know the price before he votes to buy. The first vote simply gives power to purchase. It binds no one to buy. He has the right to refuse to buy when he votes for or against the bonds. The voter is not bound to vote for the bonds after he learns the price. If a man wants a piece of property, then he considers the price. If he does not want it, the price does not affect him. That is the logical order, but whether it is logical or illogical, desirable or undesirable, a vote is necessary before a municipality can bind itself by a contract of purchase, or the 'owner' by condemnation. When a man calls upon a court to enforce a right that he has not now, but hopes to have in the future, the courts should say to him, 'When your right accrues, it will be time enough to seek its enforcement'."

It is also prerequisite to appellant's right to condemn utility property that an election be held under the 1943 Revenue Bond Act to invoke the jurisdiction of the Court. If appellant as it declares in its complaint [Tr. 19, par. IX] intends to finance the acquisition of appellee's property under this Act, it must comply with the statutory requirements thereof. In *Town of South Tucson v. The Tucson Gas, Electric Light & Power Company, a Corporation,* No. 10921 ..... Fed. (2d) ....., this Court held that:

> "To invoke the jurisdiction of the superior court, the statutory requirements of the Municipal Revenue Bond Act of 1943, with which the complaint must allege compliance, are
>
> '16-2603. Powers of municipalities.—in addition to any powers it may now have a municipality shall

have power: (to) acquire, by . . . the exercise of the right of eminent domain, any utility undertaking or part thereof, and acquire in like manner land, rights in land, or water rights in connection therewith; 2. to issue its bond to finance the cost thereof. . . .'

'16-2604. Vote on bond issues.—Questions of bond issues under this act shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose, as provided in this act!

'16-2605. Election resolution.—(a) The governing body shall adopt an election resolution calling an election upon the question of the issuance of bonds. Such resolution shall state in substance: 1. the maximum amount of bonds to be issued; 2. the purpose for which the bonds are to be issued'."

We believe the filing of the action to condemn by appellant was premature. Because of its noncompliance with the Charter requirement that an election be held resulting favorably to its acquiring utility property, it had no authority to acquire the property by any means at the time suit was filed. And further, even had such an election been held authorizing the acquisition of a property by appellant, a further election was required, under the Arizona Revenue Bond Act of 1943. There was in existence at the time of the initiation of the condemnation action, no authority granted by the general taxpayer-electors under the Charter, nor by the real property taxpayer-electors under the Revenue Bond Act, for appellant to proceed to condemn appellee's property.

Court Had Jurisdiction Only of Pima County Property.

It must be kept in mind that appellant, as plaintiff in the lower court, was attempting to condemn all of appellant's property used or useful in supplying and distributing electric light and power and artificial and natural gas within the State of Arizona. Paragraph VI of the complaint [Tr. pp. 17, 18] states:

> "That the property and interests in property above described plaintiff believes it to constitute all of the property of the defendant used or useful for the purpose of supplying and distributing electric light and power and artificial and natural gas to the City of Tucson and its inhabitants and to the consumers located outside of the City of Tucson and within the State of Arizona within the area in which the defendant is now operating and supplying such commodities and services."

Appellant further alleges [Tr. p. 3]:

> "That all of said property and interests in property is devoted to a public use and is used or useful by the defendant in supplying electricity and natural and artificial gas to said City of Tucson, and its inhabitants, and to said consumers located outside of the City of Tucson and within the State of Arizona."

Appellant then described the property and interest in property [Tr. pp. 3-17, incl.] and includes all property of every description owned, operated or controlled by appellee in its public utility business in four counties.

The complaint does not segregate the property situated in one county from the property situated in another county, except as to some parcels of real estate, but seeks to condemn the property as a whole and not any part thereof.

The Superior Court of Pima County has no jurisdiction to ascertain the value of appellee's property in Pinal County, Santa Cruz County and Cochise County. The Arizona Statute of Eminent Domain requires that the action must be brought in the county where the property is situated. Section 27-909, 1939 Arizona Code, Annotated, provides:

> "All proceedings for condemnation must be brought in the Superior Court of the county in which the property is situated in the same manner as other civil actions. . . ."

The complaint shows that the property is an integrated system and could not physically be separated in each county because the court in each county would be utterly unable to find the value of property in other counties connected with and operated as a whole going public utility. The court of any one of these counties could not ascertain the severance damages, when it has jurisdiction to ascertain the value of the property only in one county. The value of, and damages to, such a utility property would be impossible of ascertainment, in whole or in part, under the Arizona Law.

Appellant Could Not Acquire Utility Property Located Outside City of Tucson.

It will be noted that appellant pleads, in paragraph VIII of its complaint, [Tr. pp. 18-19]:

> "That the above described property is now devoted to a public use and that the public use to which it is sought to be applied by the plaintiff is a more necessary public use."

Arizona Law of Eminent Domain is contained in Article 9, Sections 27-901 to 27-921, Arizona Code, Annotated, 1939. Sections 27-907 reads as follows:

> "Uses for which may be taken.—Before property can be taken, it must appear that the use to which it is to be applied is a use authorized by law; that the taking is necessary to such use, and, if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. (R. S. 1901, Sec. 2451; 1913, Sec. 3078; R. C. 1928, Sec. 1335."

If appellant were permitted to condemn the utility property of appellee, exclusive of all such property situate or located in the City of Tucson, it would thereby reduce all the property condemned, with the exception of that part of the property within the confines of appellant's municipality, to private use. It would take away from the consumers outside the City of Tucson the right to demand public service of gas or electricity. The city would have no obligation to serve outside its corporate limits.

The Arizona Supreme Court, in the case of *City of Phoenix v. Kasun,* 34 Arizona 470, 97 Pac. (2d) 210, has announced the principles governing the operation of public utilities by municipal corporations. This was an action by the plaintiffs on behalf of themselves and others similarly situated against the City of Phoenix to enjoin the city from passing an ordinance increasing water rates to be paid by consumers outside the city limits. The court laid down certain rules governing municipal corporations operating public utilities both within and without their corporate limits, as follows:

> "(a) A municipal corporation has a right to furnish water through its municipal water plant to consumers without, as well as within, its corporate limits,
>
> "(b) While furnishing water in this manner the state corporation commission has no jurisdiction to regulate its actions towards consumers, whether inside or outside of such limits;
>
> "(c) The legislature is the only body which has the right to regulate the rates charged by a municipal corporation operating a public utility, and it has plenary power in that respect except as limited by the Constitution;
>
> "(d) A municipality may not compel consumers outside of its corporate limits to purchase water from it, nor can it be compelled to furnish such water to non-residents;
>
> "(e) A municipality can only dispose of its surplus water outside of its corporate limits suzject to the prior right of its inhabitants in case of shortage."

Among other things, the Arizona Supreme Court, in speaking of public use, said:

> "The distinguishing characteristic of a public utility is the devotion of private property by the owner

to such a use that the public generally, or at least that part of the public which has been served and has accepted the service, has the right to demand that such service, so long as it is continued, shall be conducted with reasonable efficiency and under proper charges. When the property is thus devoted to the public use, certain reciprocal rights and duties are raised by implication of law as between the utility and the persons whom it serves, and no contract is necessary to give them. Inasmuch, therefore, as one who devotes his property to a use in which the public has an interest, in effect grants to the public an interest in the use thereof, he must submit to being controlled by the public for the common good to the extent of the interest thus created and so long as such use is continued. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. The right inherent in the public authorities to control the rates to be charged by those operating public utilities is based on the fact that they owe a legal duty to the public to furnish certain services and can, therefore, be regulated by the public as to the price to be charged for such services. It is upon these basic principles that the entire superstructure of public regulation of public utility corporations is based.

"But the fact that a business or enterprise is, generally speaking, a public utility does not make every service performed or rendered by those owning or operating it a public service, with its consequent duties and burdens, but they may act in a private capacity as distinguished from their public capacity, and in so doing are subject to the same rules as any other private person so acting. Killam v. Norfolk, etc. R. Co., 122 Va. 541, 96 S. E. 506, 6 A. L. R. 701. Since the basis of the right of regulation is that a duty is owed the public, regardless of contract, it

follows as a corollary that when the duty which arises is based purely on contract and not on law, express or implied, the situation is governed by the rules applying to private contracts in general, notwithstanding that one of the parties may be operating a public utility."

From the case of *Childs v. City of Columbia,* 87 S. C. 566, 70 S. E. 296, the Arizona Supreme Court quoted the following language:

" 'Evidently the complaint is framed on the theory that the City of Columbia is to be considered, with respect to the contract alleged, as if it were a private business corporation, bound by any contract made by the city authorities to furnish water beyond the city limits. Counsel for appellant has submitted an elaborate argument supported by many authorities in support of that theory. Assuming the correctness of this position, it does not by any means follow that the city occupied toward the plaintiff, a nonresident, the relation of a public service corporation, under obligation to contract with him for his water supply at a reasonable rate without discrimination.

"All powers and privileges conferred by the Constitution and statutes on municipal corporations must be held to be limited in their exercise to the territory embraced in the municipal boundaries and for the benefit of the inhabitants of the municipality, unless the Constitution or statute expressly provides that such power and privileges may be exercised beyond the corporate boundaries, or for the benefit of nonresident. * * *

" 'Assuming that the city authorities had the power to contract with the plaintiff to furnish water for his residence and other houses, and that the duty devolves on them of contracting for the sale of any

> excess of the city's water supply beyond the municipal needs and the needs of its inhabitants, it is, nevertheless, perfectly obvious that the duty to sell the excess of its water supply did not import an obligation to make a contract with any particular person at a reasonable price; but, on the contrary, did import an obligation to sell its surplus water for the sole benefit of the city at the highest price obtainable. It was a duty not owed to outsiders, but exclusively to inhabitants and taxpayers of the city. *It follows that the plaintiff as a mere non-resident had no rights whatever against the city, except such as he may have acquired by contract. In other words, the city was under no pubilc duty to furnish water to the plaintiff at reasonable rates or to furnish it at all,* and to obtain the injunction the plaintiff must show that the city is about to violate its contract with him.' " (Italics our.)

The court stated that after a careful consideration of all the authorities, it was of the opinion that the controlling factors in the case were that the city was under no obligation as a matter of law, to furnish any service to the plaintiffs; that the relationship between them was purely contractual in its nature, and reversed the holding of the lower court, which had granted a temporary injunction against the city.

It follows from this case that any service of a utility by a municipality outside its confines is gratuitous; that the consumer who has a right to demand service from a public service corporation loses that right if the utility property is acquired by a municipality, and that the obligation to use the plant or system for public service has been terminated upon acquisition of it by a municipal corporation, outside its corporate limits.

Certainly the use for which this property, already appropriated to a public use, with the possible exception of that located within the appellant's corporate limits, is not sought for a more necessary public use. The bulk of the property, as reflected by the description of it in the complaint [Tr. pp. 3 to 17, incl] would be reduced to private use subject to such contracts for service as the municipality might wish to make, and the utilities delivered at whatever rate the municipality might wish to charge.

It was the province of the lower court to decide whether the property of appellee was sought to be taken by appellant for a public or private use.

Section 17 of Article 2 of the Constitution of the State of Arizona (Page 72 Arizona Code, Annotated, 1939) provides:

> "Eminent Domain.—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use

> alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

True, Section 16-2603 of the Arizona Code, Annotated, 1939, provides that a municipality may acquire within or without its corporate limits any utility undertaking or any part thereof, but the provisions of that section must be read in the light of Section 17 of Article 2 of the Arizona Constitution, just cited, which provides that private property shall not be taken for private use, and also Section 27-907 of the Code, being part of the chapter on Eminent Domain, hereinbefore cited, which further provides that if the property sought to be taken is already appropriated to some public use, the public use to which it is to be applied must be a more necessary public use.

Where the only obligation of a municipal corporation, operating a utility, is to its own citizens or residents, in the absence of contractual obligations which it might enter into, and where it has no duty to furnish services to non-residents of its municipality and can only dispose of its surplus services or products outside of its corporate limits, subject to the prior right of its inhabitants in case of shortage, unquestionably the only public service rendered by such municipality is wholly and solely within its own borders and existing nowhere else.

Further, a municipal corporation in Arizona is not a public service corporation. Section 2 of Article 15 of the Constitution of Arizona (p. 196 Arizona Code, Annotated, 1939) clearly defines public service corporations as follows:

> "Public Service Corporations.—All corporations other than municipal engaged in carrying persons or

property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations."

The Arizona Corporation Commission, the regulatory body of Arizona, under Section 3 of Article 15 of the Constitution of the State, has full power to regulate public service corporations within the State (P. 197 Arizona Code, Annotated, 1939), the pertinent part of that section being as follows:

"Powers to regulate rates, service.—The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations. * * *"

The Corporation Commission has no such power over municipal corporations and their services. Their rates are unsupervised and uncontrolled, the sole power of regula-

tion being in the Legislature, and there does not exist today and may never exist in Arizona any regulation, supervision, or control of a municipality's utility operations.

It has been held that the sole power of regulation of municipalities in the Legislature and any attempt to delegate to the Corporation Commission is void. (*Menderson v. Phoenix,* 51 Ariz. 280, 76 Pac. (2d) 321; *Phoenix v. Wright,* 52 Ariz. 227, 80 Pac. (2d) 390.).

The private corporation is required by law to serve all persons or corporations within its territory with the utilities it produces or distributes. The private corporation is regulated by law and by the orders and directions of the Arizona Corporation Commission as to the character of its service and as to its charges therefor. The private corporation must serve the consumer within the territory in which it operates and must serve such consumer in the manner and at the rates prescribed by the state through its regulatory commission. It has that obligation and the consumer is vested with the right to demand the service. A municipal corporation has no such obligation either within or without its corporate limits.

While a municipality might well be acquiring property within its corporate limits for a public use or purpose, certainly it cannot be said that it is furthering a public purpose in taking over utility property outside the corporate limits already applied to a public use that is obligatory upon the operator of the utility and changing the service into one that may or may not be made or, if made, may

not be continued as the officers of the municipality may decide.

The public use for which the right of eminent domain may be granted must be one for a public utility which the public has the right to share impartially and one generally recognized by settled practice as a fit purpose for the exercise of the power of condemnation. (*Homes Electric Protective Company v. Williams,* 228 N. Y. 407, 127 N. E. 315.).

We think the true definition of public use has been stated most clearly in the case of *Allen v. Railroad Commission,* 179 Cal. 68 (88), 175 Pac. 466 (474), as follows:

> "That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted so long as it is continued with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and every individual member of it, as a legal right. Such is not only the accepted significance of the phrase, by the great weight of authority as expounded by Mr. Lewis (Eminent Domain, Sections 164, et seq.), but is the definition repeatedly announced by this court."

We contend that the taking of utility property of appellee in all that territory outside the municipal limits of appellant would constitute the taking of private property for private use in violation of Section 17 of Article 2 of the Constitution of the State of Arizona, hereinbefore cited.

Jurisdictional and Constitutional Questions Involved.

No Adequate Method Provided by Law for Evaluating Utility Property.

As to the provision of the Eminent Domain law pertaining to method of fixing the valuation of property sought to be condemned, Sec. 27-909 of the Code, hereinbefore cited, provides:

> "All proceedings for condemnation must be brought in the Superior Court of the county in which the property is situated in the same manner as other civil actions . . ."

To condemn the utility property of appellee, appellant would be required to file an action in each of the Superior Courts of Pinal County, Cochise County, Santa Cruz County, and Pima County in an attempt to fix the compensation and damages, as appellant's property is situate in all these counties [Part Six of Complaint, T. R. pp. 14; Sec. 4 of Part Seven, T. R. p. 16], which include a transmission line sixty-seven miles in length in Pima and Santa Cruz Counties [T. R. p. 14] and certain transmission lines and distribution systems serving various consumers designated in the Complaint [T. R. p. 16].

The foregoing property constitutes the electrical utility of appellant and, in addition, there is included the gas utility consisting of the transmission line and distributing system located in both Pima and Pinal Counties [T. R. p. 16, Sec. 3 of Part Seven of the Complaint].

Appellant's property cannot mechanically or otherwise be divided into four parts for valuation for the ascertain-

ment of compensation and damages for the taking, even had appellant filed an action in each of the counties where the property is situate. So to begin with, the Eminent Domain law of Arizona does not provide any due process of law nor confer jurisdiction in any court to ascertain the just compensation to which appellant would be entitled for the taking of its property by condemnation.

Appellant's utility property, both gas and electric systems, constitute a going business as alleged in the Complaint in Paragraph VI [Tr. p. 18], and on the face of the situation, it is clearly apparent that no one court can take into its hands that part of the property located within its particular jurisdiction and fix the damages and compensation without reference to the whole. Further, the Arizona statute of Eminent Domain provides only for the ascertaining of the value of and damages to real estate and its appurtenances. This is clearly apparent from the language of Sec. 27-915 of the Arizona Code Annotated, 1939:

> "Value, damages, and benefits to be found.—The court or jury shall ascertain and assess:
>
> 1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consist of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;
>
> 2. If the property sought to be condemned constitute only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion

sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit be equal to the damages assessed, under subdivision two of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, the cost of cattle guards where fences may cross the line of such railroad. As far as practicable, compensation must be asessed for each source of damage separately. [R. S. 1901, Sec. 2459; 1913, Sec. 3087; rec., R. C. 1928, Sec. 1343.]

No provision is made by this law for the ascertainment of value of any property other than real estate and interests therein.

In the case of *Lone Star Gas Company v. Fort Worth*, 128 Texas 392, 98 S. W. (2d) 799, the court said:

> "If it be found, then, that eminent domain proceedings are void when undertaken under a statute conferring the power but not making suitable and adequate provisions for the ascertainment of compensation and the payment thereof, there can be no question that injunction to restrain a threatened taking under such proceeding is proper. Ft. Worth Improvement District v. Ft. Worth, 106 Tex. 148, 158 S. W. 164, 170, 48 L. R. A. (N. S.) 994."

A very apt statement of the rule is set forth in the case of *Watauga Water Company v. Scott,* 111 Tenn. 321, 76 S. W. 888, 889, in the following language:

> "It is a fundamental principle of the law of eminent domain, and the taking of property for public use, that it can only be done by making just compensation to the person whose property is taken, for its reasonable value; and any legislation which confers the right of eminent domain can only be valid upon condition that such compensation is provided for, and the mode and manner of ascertaining and enforcing the same is fixed and established."

We believe that the Arizona statute of eminent domain was designed and intended to establish procedure only in the case of the taking of real estate and interests therein or appurtenances thereto, and by the very terms of Sec. 29-915 of the Code, herein cited, a court or jury is limited to such values.

Valuation as of Date of Summons Is Unconstitutional.

We have discussed the question of taking appellant's property for private use and while we shall only by reference call the court's attention to that point, the taking for such use is clearly in derogation of the constitutional prohibition referred to herein.

Section 17 of said Article 2 of the Arizona Constitution provides that "no private property shall be taken or damaged for public or private use without just compensation having been made or paid into court for the owner . . ."

The compensation and damages provided in the Eminent Domain Act are defined by Section 27-916 of the Arizona Code, Annotated, 1939, as follows:

> "Damages and value fixed from date of summons. For the purpose of assessing compensation and dam-

> ages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation and damages. If an order be made letting the plaintiff into possession prior to final judgment, the compensation and damages awarded shall draw legal interest from the date of such order. No improvements placed upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages."

It will be noted that the actual value at the date of the summons shall be the measure of compensation and that no improvements placed upon the property subsequent to that date shall be included in the assessment of compensation or damages.

The complaint in this action was filed January 12, 1944 and the summons was served January 15, 1944 [Tr. p. 21]. All that appellee might receive were the action carried to judgment for appellant would be the value of the property as of January 12, 1944. Appellee is operating all the property described in the complaint as a public utility and is under the jurisdiction, orders and regulations of the Arizona Corporation Commission to extend its properties whenever public convenience and necessity require. In the normal operation of its business over a period of months and years, capital additions are inevitable, whether by order of the commission or not. Extensions, new connections, and the installation of additional equipment and material are vital and necessary to a going public utility.

Were this action one to condemn real estate only, the interest therein and appurtenances, no burden or obligation would be upon the owner, unless he were conducting public service, to add anything to the value of the prop-

erty during the period of litigation, and the provision of the Arizona Constitution, requiring just compensation to be paid, would, in that event, be observed and complied with.

The owner of a public utility property receives no interest upon the amount of the value found, although the property may be taken months or years after the initiation of the action. Interest runs only from the date of the judgment. Section 34-128 of the Arizona Code, Annotated, 1939, provides:

> "The Clerk shall include in the judgment entered by him the costs and interest on the verdict from the time it was rendered."

So, it is most evident that in an action to condemn property, the operator of a public utility in Arizona may hold his property under the cloud of the action for a very long period of time and then if the property be finally taken, he is deprived of the value of necessary additions and betterments made to that property to carry out his obligations as an operator rendering public service.

We submit that the Arizona law of eminent domain, when applied to the taking of lands, provides for just compensation to be made in compliance with the Arizona Constitution, but when applied to the acquisition of a public utility business, presents a vastly different situation.

The Court of Errors and Appeals of New Jersey, in the case of *Passaic Consolidated Water Company v. McCutcheon, Clerk, et al.,* 105 N. J. L. 137, 144 Atl. 571, passing upon an identical situation, has held that a law, requiring the value of a public utility company's property to be fixed as of the date of filing of a condemnation com-

plaint, is insufficient to afford a privately owned public utility company a full and complete method for the obtaining of just compensation for its properties, rights and franchises, in that it fails to provide any method of compensation for extensions, betterments and improvements, as it may be obliged to make to its property during the pendency of the condemnation proceedings to render adequate service as a public utility, and this court held that the owner of a public utility property is not required to submit its property to such jeopardy, that it must be afforded a remedy to which it can resort of its own motion to obtain just compensation, and that as an owner of public utility property, it shall not be obliged to have its property subjected to condemnation under such statutes. The New Jersey Circuit Court of Appeals reaffirmed this opinion in the case of the *New Jersey Water Service Company v. Borough of Butler,* 105 N. J. L. 563, 148 Atl. 616.

Proposed Taking Violates the Due Process Provisions of Both the State and Federal Constitutions.

It is clearly apparent from the record that no order has been made letting appellant into possession prior to final judgment so that any compensation and damages would draw legal interest from the date of such order, as provided in Section 27-916 of the Arizona Code, Annotated, 1939, hereinbefore cited. Appellee is receiving nothing which it would not otherwise be entitled to in the absence of any action to condemn its property; and, further, appellee is not afforded due process of law or just compensation for its property if it be compelled to add to its property during the period of litigation, and receive no compensation therefor, but being compelled to turn over the property as added to and extended for a value fixed months or even years before the date of the final judgment. The

due process clause of the Constitution of the United States, Section 1 of Article 14 reads:

> "Citizenship—Due process of law—equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provision of the Arizona Constitution in this respect, being Section 4 of Article 2 of said Constitution reads:

> "Right to life, liberty, property.—No person shall be deprived of life, liberty, or property without due process of law."

Certainly this due process is not afforded by permitting a municipality to becloud the property of a public utility operator for a long period of time without any assurance that it eventually will be taken by the municipality, even for payment based upon the value of the property at the date the litigation was initiated. Its development and services should remain static during all of this time, any opportunity to dispose of the property to another purchaser sacrificed on account of the pending condemnation action and perhaps eventually the property, even if judgment be entered in favor of the municipality, left where it has always been, in the hands of its private owner.

Section 27-917 of the Eminent Domain Act (p. 506, Arizona Code Annotated, 1939) provides that "the plaintiff must within thirty days after final judgment pay the

sum assessed * * *." Section 27-918 of the Code provides that "payment may be made to defendants entitled thereto or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil action; and if the money cannot be paid upon execution, the court, upon a showing to that effect, must set aside and annul the entire proceeding * * *."

No showing has been made in this matter concerning the ability of appellant to pay for the property. It is inconceivable that an execution against the appellant-municipality, were the amount of the value and damages not paid by the appellant within thirty days after final judgment, could even be resorted to on account of it being a municipality, and even could such execution be resorted to that the amount of money fixed by the court could be obtained.

Virtually all the property of municipalities in Arizona is exempt from execution. Section 24-601 of the Arizona Code, Annotated, 1939, provides:

> "The following property shall be exempt from execution, attachment or sale on any process issued from any court:
>
> "21. * * * and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining owned or held by any town or city or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state. [R. S. 1913, Sec. 3302; rev., R. C. 1928, Sec. 1738.]"

Further, the courts are practically unanimous in holding that funds or credits of a municipality, acquired by it in its governmental capacity, may not be reached by its creditors by execution under a judgment against municipality, or by garnishment served upon the debtor, or depository of the municipality. *Vanderpoel v. Borough of Mt. Ephraim in the County of Camden,* 111 N. J. L. 423, 168 Atl. 575). Attention is called to copious annotations under "Levy on Municipal Funds" following the cited case in 89 A. L. R. 863-870.

Replying to Appellant's Proposition of Law II.

Counsel for appellee has argued several matters of law replying to Proposition of Law I which could just as well have been argued under either Proposition, but in replying to Proposition of Law II advanced by appellant that the complaint contains sufficient allegations to warrant condemnation of appellee's property, and is invulnerable against a motion to dismiss under the federal rules, we wish to make some brief observations.

State Procedure Was Followed by Appellee.

The filing of a motion to dismiss was proper procedure either under Rule 12 (b) of the United States District Courts or the rule of Arizona procedure, Sec. 21-429, 1939 Arizona Code Annotated, they being identical.

Section 21-429 is set forth in the Appendix of the Brief, for the court's information.

The Arizona procedure also provides that the defense of failure to state a claim upon which relief can be granted can be made by a later pleading, or by motion for judg-

ment on the pleadings or at the trial on the merits, and that also, whenever it appears by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action, Sec. 21-436 A. C. A. (See Appendix.)

Complaint Fails to State Right to Condemn.

The allegations of the complaint are not sufficient to warrant the court in granting the relief which appellant seeks, for, while municipalities may generally have the power of condemnation they may not exercise such power until the steps necessary for such exercise have been properly taken. In this instance, both the Charter of the City and the laws of the State require an election by the taxpayer-electors of the City to authorize the taking of utility property, and the complaint fails to allege that any such election has been held. By such omissions, appellant has failed in that respect to comply with the requirements of Sec. 27-910 of the Arizona Code requiring that the complaint shall state the right of appellant to condemn.

The only authority cited by appellant in support of its contention that an election is not prerequisite to its right to institute a condemnation (App. Br. 14) is *Public Service Co. v. City of Loveland,* 79 Colo. 216, 245 Pac. 494, which holds (syllabus 11):

> "As to the next point raised by counsel for the company, that condemnation proceedings by the city must first be authorized by a vote of the taxpayers, this is sufficiently replied to by the complete silence of the statute, which does not require such vote."

Complaint Fails to Show Certainty of Compensation.

The failure of the complaint to allege authorization by election to condemn appellee's property also discloses the inability of appellant to assure appellee compensation for its property sought to be taken. If the question of appellant's authorization to issue revenue bonds with which to pay for appellee's property is submitted to its citizens, no authorization at all may be given, or no authorization of an amount sufficient to compensate defendant for its property may be granted. The complaint shows no ability in appellant to compensate defendant for its property. We think this is fatal to its right to condemn.

The liability to compensate appellee for its property is confessedly not to become a general obligation of appellant. The complaint specifically declares that appellant is proceeding under the Revenue Bond Act. The financing of the acquisition of the property is wholly speculative and uncertain, both as to whether revenue bonds in any amount will ever be issued and whether the amount of the bonds, if issued, will be sufficient to compensate appellee for the value of its property.

> "Laws failing to provide the property owner with an adequate remedy for the enforcement of the payment of damages are violative of the state and federal constitutions, prohibiting the taking of private property without just compensation."
>
> *Wright v. Donaldson,* 144 Tenn. 239, 230 S. W. 605.

"The purposes of the Constitution are to place the citizen in a position to demand and receive compensation; that the enabling statutes shall point out the persons who shall pay the compensation, and at the same time furnish the remedy for the enforcement of that payment. None of these things are done by the eighth section of the act, and it is therefore unconstitutional and void."

Tuttle v. Knox County, 89 Tenn. 157, 14 S. W. 486.

"It is said that the court is not concerned with the legality of bonds in this case, and that subsequently an ordinance could be passed and submitted after the value of the plant was ascertained. The statute, however, provides a method, which is that a 'plan and system' must be adopted, and the estimated value to be expended, and the payment, the Supreme Court, supra, says is a part of the plan. This court must adjudicate the necessity, and also, prima facie at least, the qualification under the statute of the plaintiff to exercise the right, and if it is apparent upon the face of the complaint that the requirements of the statute and the decisions of the state Supreme Court have not been complied with or conformed to, the court would not do an idle thing and proceed in the cause."

City of Bremerton v. North Pacific Public Service Co., 243 Fed. 980 (983).

Appellant May Not Condemn Utility Property Serving Another Municipality.

Appellant states on page 4 of its Brief that the operations of appellee within the City of Tucson are conducted under a franchise from appellant, and that the operations of appellee outside the City are being conducted without franchise from any municipality or other consumer. We grant this.

However, by judicial notice, and by virtue of action Civ.—226—Tucson, in the lower court, (*Town of South Tucson v. The Tucson Gas, Electric Light & Power Co.*) and being No. 10921 on appeal in this court in which judgment was rendered June 12, 1945, it is clearly apparent to the court that a portion of appellee's property is located in the Town of South Tucson, Pima County, Arizona, and is used to supply electricity and gas to said Town. The Town is a municipality within the area served by appellee and as such, has exclusive jurisdiction over its streets and alleys and franchises for public utilities within its confines.

It is appellee's position that neither the 1943 Revenue Bond Act of Arizona nor any other law of the state of Arizona, has empowered one municipality to condemn utility property in another municipality, whether operating under franchise or not.

We think the case of *Spear v. City of Bremerton*, 90 Washington 507, 156 Pac. 825 (826) presents a clear statement of the law, as follows:

> "The next question, whether the city of Bremerton can purchase and maintain a distributing system in

the city of Charleston, or acquire the franchise heretofore owned by the Bremerton Water Company (Garrison-Fisher Company), is of more consequence. We are of the opinion that it cannot. The power is not within the terms of the several acts to which reference has been had, and it is certainly not within the necessary implications of any of them. The purpose of the law is plain. It is to give a city the power to acquire, by purchase or otherwise, a water system for the benefit of its own inhabitants, and the power, pending a use by its inhabitants, to dispose of any surplus. The power to sell the excess is incidental to the main purpose; that is to say, a city can develop a plant, or purchase an existing plant, and, whichever its method may be, it can reasonably anticipate the future and develop or purchase more than enough to supply its present needs. The statute does not authorize, even by the remotest implication, one city to take over a distributing system in another city. To supply water to the inhabitants of a city is a municipal function. It is to be controlled by the city using it, and not by the city selling it, and, notwithstanding it is said that the city of Charleston, through its council, has endorsed this proceeding, and waives its reserved right under the franchise in favor of Bremerton, and notwithstanding the power of Bremerton to sell its surplus to the city of Charleston, it cannot invade, or take away, the power and the duty of the council of Charleston to deal with its own inhabitants directly, and not through the instrumentality of another, in the exercise of every function committed to it by the Legislature."

And the court continues [p. 827]:

> "Another reason, or rather an argument in favor of the one reason, is that the streets and alleys of the city of Charleston belong to it. It is charged with the duty of improving them and keeping them in repair. It, and it alone, can regulate and control their use, and to permit another city to maintain, repair, and extend mains throughout the city would rob it of one of its most important functions."

We think the same rule obtains in Arizona, for in the case of *Long, et al., v. Town of Thatcher, et al.,* ..... *Ariz.* ..... 153 Pac. (2d) 153, it is held that a town's purchase of utility property serving another municipality is unconstitutional and void. The court states [156]:

> "The rule was changed or attempted to be changed by the bond act of 1943. The Town of Thatcher has accepted the offer under that act, and, by a vote of the taxpayers and qualified electors thereof, has obtained permission and authority to issue its bonds for the cost of the 'utility undertaking' (including improvements or extensions thereafter constructed or acquired), supplying it and Safford with power, and thereby acquire title to such utility, not only that part located within the limits of Thatcher but also the portion located within the limits of Safford. These bonds, under the law, are issued as the obligation of Thatcher but they and the interest thereon, it is provided, shall be paid out of the revenue collected from the users and patrons of the light and power plants wherever located. By this operation that portion of the light and power plant located in and supplying the residents of Safford is taken from Safford and given to Thatcher without any compensation what-

ever. Something like 80% of the income from the power plant is paid by the patrons of the Safford plant for which it gives service but obtain no interest in the property of the plant, the title thereto being lodged in Thatcher."

"This is a kind of action the law cannot and does not approve or tolerate. It is taking the property of the Safford plant without compensation first being made, which violates section 17, of article 2, of the state Constitution. It takes away from Safford the right to control its streets and to issue a franchise to a power plant to furnish light and power to its citizens, and gives it over to a neighboring municipality."

We do not contend, of course, that the major part of appellee's property is located in and serving the Town of South Tucson, but we do contend that some substantial portion of the property is there located and serving, and that under the rule laid down in the case of *Town of South Tucson* against appellee herein, which was recently announced by this court, appellant cannot sue for all the utility property under a Resolution that all be acquired and then be permitted to condemn a part of such utility property, even though it be the greater part thereof, for as said by this court:

"We are of the opinion that the allegations of the Town's complaint show that it has not complied with the requirements of the statute with regard to the resolution describing the properties sought to be condemned and thereafter paid for by the bonds, and that under the cases about cited the defect goes to the essence of the municipal ownership legislation."

Conclusion.

We respectfully submit that the lower court committed no error in dismissing the complaint in condemnation against appellee, for the reasons hereinbefore set forth. Said court was powerless to grant any relief to appellant, and the judgment dismissing the action should be affirmed.

Respectfully submitted,

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GEORGE R. DARNELL,
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Attorneys for Appellee.

APPENDIX.

Chapter IV, Par. 25, Charter, City of Tucson, Section I. The City shall have power:

"(25) To lease to persons, firms or corporations for the purpose of maintenance, operation or use, any public utility owned or controlled by the City, and to provide for the leasing of any lands nor or hereafter owned by the City, except lands donated, purchased, or used as public parks or playgrounds; provided, that any such leases shall be made only to the highest bidder therefor by ordinance duly adopted, and provided, further, that any and all bids for any such lease may be rejected at the discretion of the legislative body of the City; provided, that no public utility shall be purchased, leased, acquired, sold or in any manner disposed of, without the assent of a majority of the taxpayers, who must be qualified electors of the City, voting on the question at a general or special election at which such question may be submitted."

Section 27-910, Arizona Code, Annotated, 1939:

"27-910. Complaint—Contents.—The complaint must contain: The name of the person in charge of the public use for which the property is sought, or plaintiff, the names of all owners and claimants of the property, if known, or a statement that they are unknown, as defendants; a statement of the right of plaintiff; if a right-of-way for any road, ditch, canal or other purpose be sought, the location and general route, accompanied with a map thereof; and a description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. [R. S. 1901, par. 2454; 1913, par. 3082; rev., R. C. 1928, par. 1338.]"

Section 21-429, Arizona Code, Annotated, 1939:

"21-429. Defenses and objections—How presented.—Every defense, in law or fact, to a claim for belief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion; (1) lack of jurisdiction over the subject-matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one (1) or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. (Rules Civ. Proc., Rule 12 (b).)"

PARTS OF

MUNICIPAL REVENUE BOND ACT OF 1943.

(Sections 16-2603-4-5-6-7, and 16-2617.)

(cited in brief)

16-2603. Powers of municipalities.—In addition to any powers it may now have a municipality shall have power: 1. subject to the requirements and restrictions of sections 16-604 and 16-605, Arizona Code of 1939 (sections 3 and 4, chapter 77, Session Laws of 1933, regular session), within or without its corporate limits, to construct, improve, reconstruct, extend, operate, maintain, and acquire, by gift, purchase, or the exercise of the right of eminent

domain, any utility undertaking or part thereof, and acquire in like manner land, rights in land, or water rights in connection therewith; 2. to issue its bonds to finance the cost thereof, and, 3. to pledge to the punctual payment of the bonds and interest thereon an amount of the revenue of the utility undertaking, including improvements or extensions thereafter constructed or acquired, sufficient to pay the bonds and interest as the same shall become due, and to create and maintain reasonable reserves therefor. The amount pledged may consist of all or any part of such revenue. The governing body of the municipality, in determining the cost of the utility undertaking for which bonds are to be issued, may include all costs and estimated costs of the issuance of the bonds, all engineering, inspection, fiscal, and legal expenses allowed by law, and interest which it is estimated will accrue on money borrowed or which will be borrowed during the construction period and for six (6) months thereafter. (Laws 1943, ch. 31, Sec. 3, p. .....)

16-2604. Vote on bond issues.—Questions of bond issues under this act shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose, as provided in this act. (Laws 1943, ch. 31, Sec. 4, p. .....)

16-2605. Election resolution.—(a) The governing body shall adopt an election resolution calling an election upon the question of the issuance of bonds, such resolution shall state in substance: 1. the maximum amount of bonds to be issued; 2. the purpose for which the bonds are to be issued; 3. the maximum rate of interest which the bonds are to bear; 4. a brief, concise statement (which

need not include any detail other than the mere statement of the fact) showing that the bonds will be payable solely from revenues; 5. the date on which the election is to be held; 6. the places where votes may be cast; and, 7. the hours between which polling places will be open.

(b) The election resolution shall be published in full at least once, not less than fifteen (15) days nor more than thirty (30) days prior to the date of the election, in a newspaper published in the county of general circulation in the municipality; or, if there be no such newspaper, the resolution shall be printed in full and posted in five (5) conspicuous places in the municipality not less than fifteen (15) days nor more than thirty (30) days prior to the date of the election. (Laws 1943, ch. 31, Sec. 5, p.....)

16-2606. Registration.—The governing body may require the registration of all persons desiring to vote at the election, in which case the election resolution shall state the dates, times and places when and where such persons may register. Registration shall begin not less than ten (10) days, and shall close not less than five (5) days, prior to the date of the election. (Laws 1943, ch. 31, Sec. 6, p. .....)

16-2607. Ballots.—At the election the ballot shall contain the phrases "For the Bonds" and "Against the Bonds." To the right of and opposite each of said phrases shall be placed a square, approximately the size of the squares placed opposite the names of candidates on ballots. The voter shall indicate his vote "For the Bonds" or "Against the Bonds" by inserting the mark "X" in the square opposite such phrase. No other question, word, or figure need be printed on any ballot. The ballot need not be any particular size, nor need sample ballots be

printed, posted, or distributed. A number of ballots, exceeding by not less than ten (10) per cent the number of registered voters whose names appear on the precinct register of the precinct, town, or city for which printed, shall be printed for and furnished to each polling place. Voting machines shall not be used at any election held under this act. (Laws 1943, ch. 31, Sec. 7, p. .....)

"16-2617. Bonds not debt of municipality.—No holder of any bonds issued under this act shall have the right to compel any exercise of the taxing power of the municipality to pay said bonds or the interest thereon. Each bond issued under this act shall recite in substance that the payment of said bond and the interest thereon is enforceable exclusively from the revenue pledged to its payment. Bonds issued under this act by any municipality shall not be a debt of the municipality, nor shall payment thereof be enforceable out of any funds other than the revenue pledged to the payment thereof. (Laws 1943, ch. 31, par. 17, p.....)"

Seection 16-603, Arizona Code, Annotated 1939.

"16-603. Authorization at Election.—Before any construction, purchase, acquisition or lease, by any municipal corporation, as authorized in section 1 (par. 16-602), of any plant or property, or any portion thereof, devoted to the business of or services rendered by a public utility, shall be undertaken, such construction, purchase, acquisition or lease must be authorized by the affirmative vote of a majority of the qualified electors, who are taxpayers, of such municipal corporation voting at a general or special municipal election duly called and held for the purpose of voting upon such question. (Laws 1933, ch. 77, par. 2, p. 313.)"